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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No. 71–462

GLENN W. BRICKER,
Petitioner

vs.

SCEVA SPEARE MEMORIAL HOSPITAL,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

I. REPLY TO RESPONDENT'S OBJECTIONS THAT PETITIONER HAS NO CONSTITUTIONAL RIGHT TO PRACTICE MEDICINE AND NO RIGHT TO ASSERT "TENURE" HERE

The ruling in Hayman v. City of Galveston, 273 U.S. 414 (1927) that a physician has no constitutional right to practice his profession at a public facility is not challenged here, despite respondent's suggestion to the contrary.

The distinction between that ruling and the principle that petitioner does assert is parallel to the distinction set forth in Wieman v. Updegraff, 344 U.S. 183 (1952) where, at page 192, the Court said:

> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."

Similarly, see Sams v. Ohio Valley General Hosp. Ass'n., 413 F. 2d 959 (C.A., 4th Circuit, 1969) at page 829 and Sosa v. Val Verde Memorial Hospital, 437 F. 2d 173 (C.A., 5th Circuit, 1971) at pages 175-177.

The precise constitutional protections sought by petitioner here do not relate to any abstract right to practice medicine, but are those particular matters of procedural and substantive due process under the Fourteenth Amendment argued on pages 9 through 12 of his Petition for Certiorari.

In the same vein, respondent objects to reference by petitioner to his rights against non-reappointment as "tenure".

Petitioner replies that while he has no absolute right to practice medicine at respondent's hospital nor even such job security as a "tenured" public school teacher may have, he is constitutionally entitled to fair procedures by respondent in acting upon a proposed non-renewal of his staff appointment. These rights are properly characterized on page 4 of his petition as giving "important tenure protection", and "tenure", as used in the petition, means nothing more than this.

In a similar situation, upholding a claim against gross violation of regulations governing the procedures for dismissal of a fireman, the Colorado Supreme Court found the word "tenure" apt to describe the procedural protections. Maulding v. Schmitt, 162 Colo. 337, 339, 426, P. 2d 183, 184 (1967).

II. THE CLAIM OF "STATE ACTION" HAS BEEN FAIRLY RAISED BY PETITIONER THROUGHOUT THE PROCEEDINGS

Respondent claims that the issue has not been adequately raised below as to whether or not by its receipt of Hill-Burton and local municipal grants, its actions are "state action" within the Fourteenth Amendment.

Petitioner replies that receipt of these grants on which he relies to show "state action" by respondent are fully alleged in his second motion to amend petition for injunction (Record: Reserved Case - Second Motion to Amend, January, 1971) and are admitted by respondent's answer thereto (Record: Reserved Case - Answer to Motion to Amend). These allegations were proven by testimony of the witness Beaulieu (Record: Transcript of oral proceedings, May 1971, pages 37-40), and were not controverted. Requests for rulings on this point were made by petitioner to the trial court (Record: Reserved Case - Plaintiff's Requests for Rulings of Law Nos. 1 and 2) and were acted on by that court (Petition for Certiorari, Appendix B, Page 25, granting No. 1 and denying No. 2). Proof of the allegations as to the government grants was assumed by the New Hampshire Supreme Court (Petition for Certiorari, Appendix A, page 16).

III. PETITIONER HAS NOT WAIVED OBJECTIONS TO EVIDENCE OF HIS CONDUCT NOT BROUGHT FORTH AT ADMINISTRATIVE HEARING OR PLEADED IN THE INJUNCTION PROCEEDINGS

Contrary to respondent's claim that petitioner waived all objections to complaints against him first testified to at the hearing on temporary injunction by failure to object to admission of the Transcript (Record: Exhibit 7), petitioner's lawyer expressly reserved his rights to object to immaterial matter therein. (Record: Transcript of Oral Proceedings, May 1971, page 32).

At the hearing on the merits the presiding judge himself established a broad rule of admissibility of evidence by ruling, near the outset, after objection by petitioner to the materiality of medical staff minutes dating back to 1963 (Record: Defendent's Exhibits A-1 and A-2), "in a pro-

ceeding of this type, we are going to have to go into deep as possible to find out all the facts we possibly can . . ." (Record: Transcript of Oral Proceedings, pages 16-18).

Petitioner gave the Trial Court timely opportunity to strike all evidence in Exhibit 7 and at hearing on the merits relative to complaints not charged against petitioner at the administrative hearing. (Record: Reserved Case - Plaintiff's Request for Rulings of Law No. 8). See Douglas v. Alabama, 380 U.S. 415 (1965), where at pages 422-423 this Court said:

> "In determining the sufficiency of objections we have applied the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here."

Request No. 8 was ruled on by the Trial Court (Petition for Certiorari, Exhibit B, page 25) and was later brought to the attention of both the Superior and Supreme Courts of New Hampshire by petitioner's various motions for new trial and remand (Record: Reserved Case - Motion for New Trial, May 25, 1971; Motion to Remand, June 1, 1971; and Second Motion to Remand, August 9, 1971).

IV. SIGNIFICANCE IN THESE PROCEEDINGS OF RESPONDENT'S IMPROPER OBJECTIONS TO PETITIONER'S MALPRACTICE TESTIMONY

Respondent makes the completely erroneous claim on pages 9 and 10 of its Brief in Opposition that it was petitioner who injected respondent's objections to his malpractice testimony into this litigation, and it further claims that it only objected to this activity because it supposedly kept petitioner away from his duties on respondent's

medical staff.

On the contrary, petitioner did not specifically raise this issue in his original or amended petition for injunction. It is first found in his answers to pointed questions from the court at the hearing on temporary injunction (Record: Exhibit 7, pages 16-17 and 105-108), and was then avidly followed in respondent's lawyer's cross examination of him (Record: Exhibit 7, pages 123-142).

In the direct examination of respondent's witness Pascoe Roberts (Record: Exhibit 7, pages 244-245), petitioner's malpractice testimony and other medical-legal activities were complained of, and on cross examination Mr. Roberts readily agreed that it was the annoyance to the other staff doctors, and not petitioner's absence from his duties, that made such testimony objectionable. Further, he said that respondent's directors had established a policy against such testimony by petitioner. (Record: Exhibit 7, pages 250-252). The same point was made even more emphatically by respondent's president Wadleigh in his deposition (Record: Exhibit 10, direct examination, pages 12-13, and cross examination, pages 37-42), and in testimony of respondent's witness Dr. Johnson (Record: Exhibit 7, pages 180-182).

CONCLUSION

Since respondent has failed to meet squarely the basic constitutional question presented (Petition for Certiorari, Reason I, pages 9-11), attempting to conceal itself behind the undisputed but inapplicable holding in Hayman v. City of Galveston, 273, U.S. 414 (1927) and the action of

the New Hampshire Supreme Court in seeking support in state grounds which directly conflict with federal rights, petitioner submits that the need for plenary review of the decision below is indisputable. In fact, petitioner suggests that summary reversal is in order.

Respectfully submitted,

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